

On January 11, 1994 appellant, then a 56-year-old supervisor slipped on grease at work and injured her back, leg, arm and chest. The Office accepted her claim for hip and lumbosacral strain. Appellant returned to work on January 13, 1994 and retired in May 1995.

On March 29, 1995 appellant filed a Form CA-2a, recurrence of disability claim, alleging that her work injury caused ongoing disability. On September 26, 1995 the Office denied her claim. On July 1, 1999 appellant requested reconsideration. In a decision dated February 14, 2000, the Office denied the request as untimely and insufficient to show clear evidence of error.

Following the Office's February 14, 2000 decision, appellant submitted a handwritten history of medical treatment from January 11 to August 8, 1994.

On September 25, 2008 appellant requested reconsideration and submitted medical evidence. On August 9, 1994 Dr. C.V. Purushothaman, a Board-certified cardiologist, treated appellant for shortness of breath and stress related to her job. Appellant reported being pressured and harassed by her supervisors to retire in July 1994. He noted findings of radiating pain in the right leg and diagnosed stress, lumbar radiculopathy due to a work-related injury and possible peptic ulcer disease secondary to stress. In an October 25, 1999 report, Dr. Purushothaman noted treating appellant since 1985 for sinusitis, peptic ulcer disease and irritable bowel syndrome. He advised that appellant was being treated by another physician for a work-related injury and opined that she was emotionally and physically unable to hold a job due to her current conditions. On August 2, 2002 Dr. Purushothaman excused appellant from jury duty due to anxiety attacks. On August 9, 2007 he treated appellant for left and right-sided leg pain and opined that appellant's condition had not improved since 1994. On December 19, 1994 Dr. Irl J. Wentz, a Board-certified orthopedist, who noted appellant returned to light-duty work on September 19, 1994 with restrictions. He referenced a magnetic resonance imaging (MRI) scan dated May 3, 1994 which revealed asymmetric disc bulging on the left at L4-5 and scoliosis on the right. Dr. Wentz noted findings upon physical examination of back pain with forward flexion and extension, positive straight leg raises on the left and tenderness over the left sacroiliac joint. He diagnosed stress-related aggravation of symptoms. On October 23, 1998 Dr. Linn H. Parsons, a Board-certified gynecologist, treated appellant for vulvodynia/pudendal neuralgia and pelvic myalgia and noted that appellant was being treated elsewhere for back and neck pain.

In a June 6, 2008 report, Dr. Ashraf Guirgues, a Board-certified orthopedic surgeon, to whom appellant was referred by Dr. Purushothaman, noted that appellant presented with complaints of low back and left leg pain. Appellant reported walking through a doorway at work in 1994 and slipping on grease and sustaining a back, left leg and right shoulder injury. She noted having low back pain since 1994 radiating into her left leg that recently worsened causing difficulty in walking and pain with driving. Dr. Guirgues noted tenderness in the paraspinal midline, neurologic examination revealed intact sensation except for diminished sensation over left lower extremity and motor examination revealed intact except for decreased strength in the left lower extremity. He noted lumbar spine x-rays revealed degenerative disc disease throughout, old compression fracture at L2, degenerative scoliosis and Grade 1 retrolisthesis at L5-S1. Dr. Guirgues advised that a June 2, 2008 lumbar MRI scan revealed an old compression fracture of L2, small retrolisthesis and disc desiccation at L4-5 with minimal disc bulging at all levels of the thoracic spine. He diagnosed old compression fracture at L2, healed, persistent low back pain, degenerative disc disease, radiculitis with radiating pain into the left lower extremity and subjective complaints of left leg weakness. Dr. Guirgues advised that he did not have access to appellant's old records and films and did not treat her at the time of her work injury and

therefore he could not comment on whether the lumbar changes were due to injury or degenerative issues.

On August 22, 2008 Dr. Guirgues opined that appellant had back pain and disc degeneration associated with a fall at work in 1994. He indicated that based on the diagnostic studies and physical examination appellant did have back pain and disc degeneration related to this injury. Dr. Guirgues indicated that he could not relate all of appellant's symptoms to her injury; however, because appellant reported being asymptomatic prior to this injury in 1994 and considering the age of the injury, Dr. Guirgues believed the degenerative changes were consistent with the injury and led to restriction of function and continued back pain.

On January 12, 2009 the Office denied appellant's reconsideration request, finding that it was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.²

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.³

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

³ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.⁴

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁷ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁸

ANALYSIS

In its January 12, 2009 decision, the Office properly determined that appellant failed to file timely application for review. It rendered the most recent merit decision on September 26, 1995 when it denied appellant's claim for a recurrence of disability. Appellant's September 25, 2008 request for reconsideration was more than one year after September 26, 1995. Her reconsideration request was not timely filed.

The Board finds that appellant has not established clear evidence of error on the part of the Office. Appellant's September 25, 2008 request was accompanied by reports from Dr. Purushothaman dated August 9, 1994 to August 9, 2007. Dr. Purushothaman diagnosed shortness of breath, extreme stress resulting from job harassment, lumbar radiculopathy due to injury sustained on job, possible early peptic ulcer disease secondary to stress and irritable bowel syndrome. These reports noted appellant's disability but generally did not address her accepted 1994 hip and lumbosacral strains or the claimed recurrence of disability. On December 19, 1994 Dr. Wentz noted findings on diagnostic studies and diagnosed stress-related aggravation of symptoms. On October 23, 1998 Dr. Parsons diagnosed vulvodynia/pudendal neuralgia and pelvic myalgia. These reports do not establish that the Office erred in its denial of appellant's 1995 claim for a recurrence of disability.

The reports from Dr. Guirgues dated June 6 to August 22, 2008 do not establish that the Office erred in its denial of appellant's 1995 claim for a recurrence of disability. Dr. Guirgues opined that he had not participated in appellant's care at the time of injury and therefore could not comment on whether any lumbar changes were due to injury or degenerative issues. On August 22, 2008 he opined that appellant's degenerative changes were consistent with her work injury. However, these reports do not address whether appellant sustained a recurrence of disability in 1995 causally related to her January 11, 1994 work injury. The Board notes that

⁴ *Annie L. Billingsley*, *supra* note 2.

⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.⁹

The Board finds that the medical evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's prior decision. Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision.

On appeal appellant alleges that she continues to have back and leg pain related to her January 11, 1994 work injury. However, as noted, appellant has not submitted sufficient evidence to establish clear evidence of error in the Office's most recent merit decision. That is the only matter over which the Board has jurisdiction in the present appeal.¹⁰

CONCLUSION

The Board finds that appellant's request for reconsideration dated September 25, 2008 was untimely filed and did not demonstrate clear evidence of error.

⁹ *D.G.*, 59 ECAB ____ (Docket No. 08-137, issued April 14, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

¹⁰ See 20 C.F.R. § 501.2(c) (the Board only has jurisdiction over final decisions of the Office).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board